VIRGINIA LAW REGISTER

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The Albemarle Bar III. —William Wirt.

With the exception of Jefferson, by far the best known and most distinguished member of the Albemarle Bar was William Wirt. And yet today the rising generation knows of him as little more than a name. It may not be amiss to recall him to the memory of a generation too prone to forget, and to lawyers to whom his fame as a great lawyer is hardly a memory. He was born in Bladensburg, Maryland, on the 8th of November, 1772, of Swiss parentage on his father's side. After an education which though limited seems to have laid the foundation for the wider and more extensive knowledge of after years, he studied law, whilst a tutor in the family of a Mr. Edwards of Montgomery County, Maryland, and with Mr. William P. Hunt, at Montgomery Court House. In 1792 he moved to Culpeper and was duly licensed to practice law, although he had only resided in Virginia five months. He was successful in his first case and rapidly rose to a remarkable degree of success. After two years' practice in that county he removed to Albemarle and came under the friendly eye of Dr. George Gilmer of Pen Park, the learned and genial physician, the charming and cultivated gentleman, and the stern Revolutionary patriot.

Gilmer was highly educated; of wit, genius and refinement, and his lovely home with its broad acres, extending almost up to the little hamlet of Charlottesville, was the seat of a hospitality as generous as it was charming.

He was the ancestor of many distinguished men and women, some of whom may be mentioned hereafter. One fair daughter, Mildred, soon proved a greater attraction than all of Dr. Gilmer s wit and learning, and on the 28th day of May, 1795, she and Wirt were united in marriage.

Dr. Gilmer was an intimate friend of Jefferson and Madison and Monroe and soon brought his brilliant young son-in-law into close contact with these great men—a contact which grew into intimacy and friendship.

Wirt's practice and reputation increased rapidly after his marriage and he came in contact with such men as Barbour, Cabell —another member of the Albemarle Bar who subsequently became President of our Court of Appeals—Stuart and others, who enjoyed a well deserved reputation. He contracted a warm friendship with Dabney Carr, Mr. Jefferson's nephew, and a member of the Albemarle Bar who subsequently became a member of our Supreme Court of Appeals. This friendship only terminated with death.

No county in the State at that time was more noted for hospitality and for the cultivation and refinement of the upper classes than Albemarle. Life was exceedingly pleasant, though from all contemporaneous accounts, rather gay. Prohibition was an unknown quantity and good wines, good liquors, good food and good company abounded. Wirt, it is said, was one of the gayest of the gay and at the festive board in his home town, or on circuit he was noted for wit and eloquence and an ability not only to "set the table on a roar," but to lay a good many of the guests under the table.

Kennedy in his life of Wirt mentions the following episode, of Wirt's life in Albemarle, which may not be unworthy of republication.

"James Barbour, Dabney Carr, and Wirt were on their customary journey to Fluvanna, the adjoining county to Albemarle, to attend the court there, 'the State of Flu,' as that county was called in their jocular terms. They had been amusing each other with the usual prankishness which characterized their intercourse. Wirt was noted for making clever speeches, as they rode together. In these he was wont to imagine some condition of circumstances adapted to his displays. Sometimes he rode ahead of his companions, and, waiting for them by the roadside, welcomed them in an oration of mock gravity, to the confines of 'the State of Flu,' representing himself to be one of its dignitaries, sent there to receive the distinguished persons into

whom he had transformed the young attorneys of the circuit. These exhibitions and others of the same kind are said to have been of the most comic spirit and to have afforded many a laugh to the actors. At the time of the incident I am about to relate the three whom I have mentioned, arrived at Carr's Brook, in Albemarle, the residence of Peter Carr, where they dined and passed the night. During this visit, whilst indulging their customary merriment, Barbour entertained them with a discourse upon the merits of himself and his companions, in the course of which he undertook to point out their respective destinations in after life. 'You, Dabney,' said he, 'have indulged a vision of judicial eminence. You shall be gratified, and shall hold a seat on the Bench of the Court of Appeals of Virginia. Your fortune, William,' he continued, addressing himself to Wirt, 'shall conduct you to the Attorney Generalship of the United States, where you shall have harder work to do than making bombastic speeches in the woods of Albemarle. As for myself, I shall be content to take my seat in the Senate of the United States.' "

This little passage in the lives of the three gay companions has only become notable from the singular fulfilment of the jocular prophecy in respect to each of the parties.

Dr. Gilmer died two years after Wirt's marriage and Wirt erected on the portion of the estate allotted to his wife a frame residence yet known as Rose Hill. The house still stands, now within the City of Charlottesville, and as the Southern Railroad's trains thunder by it within a stone's throw, few if any of the passengers realizing that this modest home is a shrine which ought to be preserved along with Monticello and Montpelier.

We wish that space would permit us to detail the happy years —golden, he called them—of Wirt's residence in Albemarle. He came to the County poor, well nigh without friends. He left it with a host of friends who remained friends to the end of the chapter. He made money, he made reputation, and but for the grim reaper's handiwork he might have remained and added another illustrious son to the bede-roll of Albemarle's famous men.

On September 17th, 1799 Wirt's wife died, childless, and

Wirt seemed unable to remain amidst scenes which daily reminded him of that beautiful, happy and brilliant companion. Above her grave he erected a monument with this inscription:

"HERE LIES MILDRED,

Daughter of George and Lucy Gilmer, Wife of William Wirt.

She was born August 15th, 1772, married May 28th, 1795, and died September 17th, 1799.

Come around her tomb each object of desire,
Each purer frame, inflamed with purer fire,
Be all that's good, that cheers and softens life,
The tender sister, daughter, friend and wife,
And when your virtues you have counted o'er,
Then view this marble and be vain no more."

The writer visited the old Pen Park graveyard some time since. Under the briars and weeds that shroud the mournful epitaph of Francis Walker Gilmer, and which have overrun the place, one can barely make out, upon a moss-covered slab, part of the name of this helpmeet of a great man. Surely a graveyard which holds the remains of such a man as Dr. George Gilmer and his brilliant son, Francis Walker Gilmer, and many other men and women of no little merit, ought not to be thus shamefully neglected.

Wirt moved to Richmond, where he was elected Clerk of the House of Delegates—an office he held for three terms. Here he became a visitor in the family of Col. Gamble and married his daughter Elizabeth, who bore him many children and who was in every way worthy of the passionate devotion Wirt lavished upon her. It is said that she cured him of the habits of dissipation by a piece of womanly sweetness as romantic as it was singular. Wirt had fallen in the street in a state of hopeless intoxication, and was lying with his face exposed alike to the burning sun and the gaze of the multitude. His fiancee passing by saw his condition. She took from her pocket a delicately perfumed lace handkerchief upon which her name was embroidered, spread it upon his face and went her way. When

Wirt awoke he felt the handkerchief, recognized its ownership, and at her feet later on vowed sobriety, and kept his vow.

In 1802 the Legislature elected Wirt one of the three Chancellors of the State. He held the office for only six or seven months, the salary being too small to maintain him and his family decently.

Virginia judges have always been most "indecently" paid. Today our judges, especially our *nisi prius* judges, are obtained at a figure well nigh contemptible compared with the emoluments of a high class lawyer.

It is rather amusing but somewhat humiliating to read what Wirt said to William Pope in a letter dated August 5th, 1803:

> "There is certainly very little justice in expecting the labour and waste of a citizen's life for one-third of the emoluments which he could derive from devoting himself to the service of individuals. Most surely there is no ground on which such a sacrifice could be justly expected, except, indeed, on the ground of public necessity. If Virginia were too poor to pay her officers, it would then become patriotic, indeed it would become a duty, to make this sacrifice to the country's good. But as it is merely *the will* and not the *power* that it wanting, it is out of the question to expect that a man should make a burnt-offering of himself, his wife and his children, on the altar of public avarice or public whim. It is really humiliating to think that although these plain truths will be acknowledged by any member of the Legislature to whom you address them in private, yet there is scarcely one man in the House bold enough to vote his sentiments on the subject, after a call of yeas and nays—he will not dare to jeopard his re-election by such a vote. Where is the difference between an Assembly thus unduly influenced and the National Assembly of France, held in duress and impelled by the lawless shouts of a Jacobine gallery? Would a Cato or a Brutus, in the Roman Senate, even have suppressed, much less belied, his real sentiments from a fear of public censure? Or is public virtue a different thing now from what it was in their time. But the best of human institutions have their defects—and this is one of those which cleave to the glorious scheme of elective government. In all cases, whatever may be his own opinion, the representative seems to think himself a mere mirror to reflect the will of his constituents, with all its flaws,

obliquities and distortions. Even when he knows that it will injure the country, he will but echo the popular voice, with the single motive of retaining his ill-deserved office rather than offend the people by honest service."

On resigning the Chancellorship he moved to Norfolk and took almost at once a high stand at the bar of that city. His first case was quite a noted one, being the defence of a man by the name of Shannon, who was arraigned for the murder of his father-in-law and against whom the circumstantial evidence appeared almost absolutely convincing. Wirt appears to have excited great expectations in this case, which was tried at Williamsburg, where the Courthouse was thronged with visitors, a large number of ladies amongst the rest. His speech in this case brought him great reputation.

In the month of August, 1803, in *The Argus,* at Richmond, Virginia, there commenced a series of letters signed "The British Spy," a work which at once leaped into a popularity scarcely paralleled in American literature, and it conferred upon Wirt a distinct and permanent literary reputation. These letters were subsequently gathered into book form and edition after edition came from the press. Some of the portraits which the author drew of his contemporaries at the bar gave some little offence and for some time persons whose pictures he thus drew were very cold and inimical towards Wirt. It is a great pity that this book should not be re-published, for we believe it would be read with almost as much interest today as when first published. To those who are fortunate enough to have been taught their spelling and reading in the wonderful spellers and readers of the late Professor William H. McGuffey, one chapter from this book will always be remembered—Wirt's description of the "Blind Preacher"—probably one of the most beautiful pieces of descriptive writing in the English language. What a pity it is that instead of using these newfangled and constantly changing readers our schools do not return to the books prepared by Dr. McGuffey. They contain the best selections of English literature, splendidly arranged, and no one who ever graduated in these books misspelled or failed to appreciate the beauties of the English language.

Wirt's career at Norfolk was quite remarkable. He practically leaped into reputation, influence and independence. He was accounted one of the most eloquent advocates in the State, and was soon considered one of the ablest of Virginia lawyers. As luck would have it he was employed in nearly every prominent criminal case in Norfolk, but his dislike for criminal practice grew and grew.

In 1806 he determined to remove to Richmond, where he commenced a new era in his brilliant career. The first case he had after moving to Richmond was to defend a man named Swinney, who was charged with the crime of poisoning his uncle, the venerable Chancellor Wythe, and of whose guilt there is very little doubt. Unfortunately the only evidence against this man was that of the negro slaves, and they, under the laws of Virginia being unable to testify, Swinney was acquitted.

The year 1807 brought Wirt from local notice into widespread American fame. The Attorney General of the United States having withdrawn from the prosecution of Aaron Burr, Mr. Wirt was associated with George Hay, the United States District Attorney for Virginia, and Mr. McRea. The history of this great trial is too well known to need any description in a paper as brief as the present, but again the writer recalls reading in McGuffey's Fifth Reader Wirt's magnificent description of Blennerhasset's Island, which he has just re-read with a pleasure almost as great as when he saw it for the first time. Curious to say, this beautiful and brilliant piece of rhetoric was interjected in a learned argument before Chief Justice Marshall setting forth principles in minute discriminations of technical law and in the analysis of legal decisions. We have often wondered how the great Chief Justice listened to this rhetoric when the solitary question before him was one of law, but we believe that no man could have hesitated for one moment to listen with delight to Wirt's beautiful language, no matter how or under what circumstances it came to be delivered.

After the Burr trial Wirt became very much interested in the proposed war with Great Britain on account of the affair of the Leopard and Chesapeake, in which certain American citizens were taken off the Chesapeake by the British frigate, which fired

a broadside into the American ship, killing and wounding several men. The indignation of the American people was aroused and war seemed imminent. Wirt was amongst the foremost of the enthusiasts and was soon absorbed in a scheme to raise a legion. The British, however, denied responsibility and the war cloud blew over, to be renewed some five or six years afterwards.

Wirt without his knowledge was elected to the Legislature of Virginia in the session of 1808-9, but only served one term. He seems to have had a general disinclination for public life, and therefore it was with a great deal of surprise that his friends afterwards saw him become a candidate for the Presidency on the Anti-Masonic ticket—a ticket put forward by probably the most foolish political party that ever existed in the United States.

Wirt became very much interested in the career of Patrick Henry and determined to write his life, but laid the matter aside for a while to engage in a spirited newspaper controversy in regard to Mr. Madison's candidacy for the Presidency. The life of Patrick Henry afterwards became a reality and for a great number of years was the only life of this distinguished patriot and orator. Wirt not only had great literary talent but loved letters. In 1811 he began a series of letters in the *Richmond Inquirer* which were afterwards collected in two volumes under the name of "The Old Bachelor." These letters, some thirty-three in number, were written not only by Wirt but by Dr. Frank Carr of Albemarle, Hon. Richard E. Parker, Judge Tucker, David Watson and others. These essays are worthy to be drawn from the oblivion into which they have fallen.

The War of 1812 found Wirt one of the leaders of the Richmond Bar, Wickham and Hay dividing the honors with him. When Richmond was threatened with invasion Wirt raised a corps of flying artillery which, however, never was called upon to fire a gun except in practice.

In the year 1815 Wirt commenced his practice in the Supreme Court of the United States in Washington and was subsequently appointed by Mr. Madison, United States District Attorney for Richmond District. He made his debut in the Supreme Court of the United States in the same year, and to use his own lan-

guage, "broke a lance with Pinckney," who at that time was the leading practitioner before that Court. From that time on his success in this Court was marked, and when in 1817, President Monroe appointed him to the post of Attorney General, he had taken a leading stand at its bar.

From this time on, Wirt's career was one of uninterrupted success. He appeared in the celebrated case of *McCullough* v. *Maryland,* and in the Dartmouth College case, but in the mean time finished his life of Henry and made many contributions to the press of the day. He was associated with Webster in the leading case of *Gibson* v. *Ogden* and won the case, and it is said that his speech in this case was superior to Webster's.

When LaFayette visited Albemarle in 1825 Wirt came back to Charlottesville and was present at the dinner given to LaFayette at the University and sat on his right hand. He declined to make any speech but simply gave a toast.

Space does not permit us to dwell upon the career of Mr. Wirt from this time on, as it would be merely a recital of cases argued and, in most instances won. His nomination for the Presidency by the Anti-Masonic party was only less surprising than his acceptance of the nomination. Wirt himself had been a Freemason, having taken two degrees in Charlottesville, and in his letters he bears tribute to the worth of the Masonic Institution and the splendid men who were members of that institution, but states that his main reason for accepting the nomination was in the hope of wresting the Government from the hands of the present incumbents—Andrew Jackson being President.

He died on February 18th, 1834, and the proceedings had before the Supreme Court on that day, in which Webster, Attorney General Butler, and Sargent of Philadelphia, took part, are expressive of the high stand which he had taken in that Court, and of the regard in which his professional brethren held him. Chief Justice Marshall, in receiving the resolutions of the Bar, said: "The Court have received intelligence of the afflicting event which has produced the meeting of the Bar and the application just made with those emotions which it was but too well calculated to excite. I am sure I utter the sentiments of

all my brethren when I say we participate sincerely in the feelings expressed from the Bar; We, too, gentlemen, have sustained a loss which will be difficult if not impossible to repair. In performing the arduous duties assigned to us we have been long aided by the diligent research and lucid reasoning of him whose loss we unite with you in deploring, and we too, gentlemen, in common with you, have lost the estimable friend in the powerful advocate."

The funeral took place on the 20th, and both houses of Congress adjourned to enable their members to attend the body to the tomb—a proceeding never before accorded to a private individual. The President of the United States, the Vice-President, the heads of the departments, the diplomatic corps, the bench and bar of the Supreme Court, the officers of the Army and Navy, and the two houses of Congress, with a large concourse of private citizens attended the body to the National cemetery. Adams and Jackson and Calhoun and Van Buren and Marshall and Story, Clay, Webster, Southard, Taney, Binney, Sargent, Woodbury, Everett, Cass, Generals Scott and McComb, Rogers and Chauncey stood by the grave, which received the mortal remains of this distinguished American. His memory should not be allowed to perish.

The Lever Act, and Others of that Ilk.

Horace Walpole tells us in one of his letters that a Mrs. Kerwood reading one day in the papers that a distiller's hand had been burnt by the head of a still flying off, said she wondered they didn't make an act of parliament against the heads of stills flying off. Had Mrs. Kerwood lived until today she might feel that there were upon our Statute Books a great many laws aimed at offenses about as easy to be corrected by law as the flying off of the heads of stills.

Each year sees statute after statute enacted, both by our Federal and State representatives attempting to cure evils which no law in the world but public sentiment can check. Much of it is suggested by so-called reformers who know no more about

our dual form of government than a cat does about the ten commandments, and who cry aloud for Federal legislation in matters pertaining solely to the State and *vice versa*. And the result is a great amount of half-baked statutes which the courts have to declare unfit for use.

One great evil—especially in laws making certain offenses criminal—is that men are arrested, tried and punished under these laws before a final decision can be reached holding them null and void. The gross injustice thus perpetrated cannot be cured and the victim can only grin and endure.

The Lever Act is a fair sample of these laws. Drawn so unskillfully and so vague in its terms, it has been within a few weeks only declared unconstitutional by the Supreme Court of the United States. In the meantime innumerable indictments have been found under it, men punished under it, and a swarm of Federal employees put to work to carry on enquiries into its violation, at an expense running into millions of dollars. And there are several acts of a similar nature which have not yet run the gauntlets of the courts. It may be worthy of note that two United States courts held the Lever Act unconstitutional, and two constitutional, so that we have this very remarkable condition of affairs: If a man violated the Lever Act across an imaginary line in one circuit he was guilty and duly punished; whereas on the other side of the imaginary line he might violate the same law with impunity. Such a thing ought not to be possible. Think of the gross wrong and injustice perpetrated upon citizens of this country. What respect could a man convicted and fined, and perhaps imprisoned, in one of these circuits have for law, when he saw a man equally as guilty going unwhipped of justice but a few miles off.

What's the remedy? Fewer fool laws, you might reply. One had as well try to stop Niagara with a tennis bat as to try to fend off the flood of foolish laws which are spawned out year after year by the demagogues and "reformers", and weak though well-meaning men. Declaratory judgments have been suggested and we know of no other means by which aid can be given in the present status of our laws and law makers. England has had this method of "trying out" laws for some time. One or

more of our states are attempting it. When an act like the Sherman Act or the Lever Act or the Trades Act, or a dozen more we could name, is passed, why not by proper statutory and if need be constitutional enactment, let the act be referred to the Supreme Court of the United States by proper proceedings, to be taken by the Attorney General, and its constitutionality upheld or the act declared null and void? Proper counsel might be selected by the executive, to represent the mass of the people, whilst the Attorney General appeared for the Government. It would take time and talent to work out the procedure but it could be done and the uncertainty that always hangs about most of these acts, and the wrong and injustice— not to speak of the waste of the taxpayer's money—that they produce before they reach the tribunal of last resort might be prevented.

The Cost of Litigation.

We hear, and have heard since we commenced to practice law, of the terrible cost of litigation. In Virginia such talk is absurd, for the average cost of litigation in this State has been reduced well nigh to the minimum. One who has ever seen an English taxed bill of costs and compared it with our own court costs and lawyers' fees will wonder what litigants in Virginia courts would say if they had to meet such bills. An industrious gentleman—Mr. Andrews of the North Carolina Bar—has worked out the average cost *per capita* of the supreme courts in the various states. He finds it to amount to 3.352 cents, and the costs of trial courts amount to 14.479 cents. The average cost of our state governments is $6.05. The Supreme Court of Texas costs .654 cents. In Maine the cost of the trial courts averages 2 cents. The average salary of the judges of the supreme courts in the various states is $7185.00—nearly the salary of a United States district judge. Of the forty-eight states in the Union, five pay their supreme court judges the same salary as that received by a United States district judge. Twelve pay more. The remaining states pay less, and a good many of them ridiculously less. Virginia lawyers known only too well the long and arduous struggle which

the bar had, to have the salaries of our supreme court judges raised to their present figures. Our circuit and corporation judges are miserably underpaid. William Wirt's letter to Pope, alluded to in a preceding editorial, shows that this complaint is not a new one, but Wirt is bolder than most of us have been, in giving the reasons for this failure of our legislators to reasonably compensate our judicial officers.

"Toting Razzers."

Since we wrote the editorial entitled "The Lever Act," our attention has been called to a bill introduced in the legislature of West Virginia, which is probably one of the most absurd we have ever known. It makes it a jail offense to carry a razor, either of the old fashioned kind or the safety type, in any *suit-case* in the State of West Virginia. So the unfortunate gentleman who is in the habit of carrying his old fashioned razor in his dressing case will be compelled to leave it behind when he strikes the West Virginia border; and the new man with his new-fangled safety razor will be compelled to do the same thing, though we suppose there is nothing in the law to prevent carrying the old fashioned razor in the hatband, or the safety razor in the buttonhole of the coat, the act confining the offense to suitcases. The newspaper that gives an account of this wonderful act does not say whether it was introduced by a barber or not, but if passed, we can imagine that there will be a large immigration of that fraternity to the Mountain State. But, seriously speaking, is not this one of the acts which if made into a law will bring contempt upon law and law-makers alike?

Disqualification of Judges on Account of Personal Bias or Prejudice.

The case of Berger against the United States of America certainly presents a most remarkable and unfortunate state of affairs in the construction placed by the Supreme Court of the United States upon Section 21 of the Judicial Code. Berger was tried for violating the Act of Congress of June 15th, 1917, known as the "Espionage Act,"

and duly convicted. He was tried before Judge Landis and filed an affidavit under Section 21, setting out that Judge Landis was disqualified from sitting in his case, and gave as a reason that Judge Landis had said in another case, "If anybody has said anything worse about the Germans than I have I would like to know it so I can use it." And again: "Germany had money and plenty of men. Wait and see what she is going to do to the United States." And again: "One must have a very judicial mind indeed not to be prejudiced against the German Americans in this country. Their hearts are reeking with disloyalty. This defendant is the kind of a man that spreads this kind of propaganda, and it has been spread until it has affected practically all the Germans in this country. This same kind of excuse of the defendant offering to protect the German people is the same kind of excuse offered by the pacifists of this country who are against the United States and have the interests of the enemy at heart by defending that thing they call the Kaiser and his darling people. You are the same kind of man that comes over to this country from Germany to get away from the Kaiser and war. You have become a citizen of this country and lived here as such; and now when this country is at war with Germany you seek to undermine the country which gave you protection. You are of the same kind with practically all the German Americans are in this country and you call yourselves German Americans. Your hearts are reeking with disloyalty. I know a safe-blower, a friend of mine, who is making a good soldier in France. He was a bank robber for nine years. That was his business in peace time and now he is a good soldier, and as between him and this defendant I prefer the safe-blower."

This language of Judge Landis was not used in regard to Berger but was used in sentencing other disloyalists who were tried and convicted before him, and on account of this language Berger and two co-defendants filed an affidavit of prejudice under Section 21 mentioned above, and the Supreme Court of the United States held that this affidavit was sufficient and that Judge Landis should not have sat in the case. It is impossible, if this is a fact, to see how any man could be tried in any court

in the United States. For we do not suppose that any judge worthy of his office did not entertain exactly the same feelings that Judge Landis did, and that this feeling prevented him from giving Berger a fair and impartial trial is in our humble judgment absolutely untenable, the Supreme Court to the contrary notwithstanding; Mr. Justice Day, Mr. Justice Pitney and Mr. Justice McReynolds dissenting. The latter says, and we think absolutely correctly, "Defendant's affidavit discloses no adequate ground for believing that personal feeling existed against any one of them. The indicated prejudice was towards certain malevolents from Germany—a country then engaged in Hunnish warfare and notoriously encouraged by many of its natives who unhappily had obtained citizenship here. The words attributed to the Judge (I do not discredit the affidavit's accuracy) may be fairly construed as showing only deep detestation for all persons of German extraction who were at that time wickedly abusing privileges granted by our indulgent laws. Intense dislike of a class does not render the judge incapable of administering complete justice between all its members. A public officer who entertained no aversion towards disloyal German emigrants during the late war was simply unfit for his place." To all of which we most heartily say Amen.

But we cannot with all due respect to Justice McReynolds, whom we hold in high esteem, both personally and as a judge, fail to allude to the fact that in this dissenting opinion, as in several others of the learned justice, he is determined that Mr. Justice Holmes shall not surpass him in language. He goes on: "And while an over-speaking judge is no well-tuned cymbal, neither is an amorphous dummy, unspotted by human emotions a becoming receptacle for judicial power." And while not exactly taking in the full substance of this last sentence of the learned Judge's opinion, we most heartily agree with him and Mr. Justice Day and Mr. Justice Pitney in their dissenting opinion and would that it had been the law, as it should be.

It is hard to see how the Supreme Court could have reached its conclusion. It might just as well hold that because a judge in condemning a murderer used very harsh language towards all murderers, in a subsequent murder trial an affidavit setting

out this language, would be sufficient to remove him from the bench; or that if a judge expressed from the bench the idea that all burglars ought to be hung (a conclusion we most heartily would concur in) therefore any burglar setting out this language in an affidavit could disqualify the judge.

The Federal Liquor Law. Concurrent Jurisdiction.

Our Supreme Court of Appeals in the case of *Owens* v. *Commonwealth* decided in January, 1921, has settled a much disputed question in regard to concurrent jurisdiction and has certainly clarified the law as concerns the State of Virginia in one respect.

Owens was arrested for a violation of Section 23 Prohibition Act of April 18, 1920. He was bound over to answer an indictment, was duly indicted, tried and found guilty on the 1st day of July, 1920. In the mean while, on May 17th, 1920, he was indicted for the same offense in the United States Court for the Western District of Virginia, and upon his trial in the state court he relied for his defense upon the amendment to the Code of 1919, Section 2775, and pleaded that because of such indictment in the Federal Court the prosecution in the State Court previously commenced was barred. The court refused to sustain this defense, setting out the well-settled rule that where courts have concurrent jurisdiction the court which first takes jurisdiction always has priority and the right to conclude the specific litigation, and the court entertained no doubt that under our statute, when the prosecution under a state law is commenced the accused should show that before that time there had been a prosecution or proceeding against him under a Federal statute for the same act; then that the prosecution in the state court should be barred, thus requiring as a matter of law what it heretofore rested in the discretion of the courts as a rule of comity. Thus construed the statute imposes no undue restraint

upon prosecutions either under the Federal or the State law and at the same time effectuates the true legislative purpose sufficiently manifested by the act.

Note.

Mr. W. W. Scott, State Law Librarian has just called our attention to an error in his Roster of Judges of the Supreme Court of Appeals of Virginia published in 5 V. L. R. N. S. 185. In note 1, on page 187, Judge St. George Tucker who resigned in 1811, is referred to as having again become a member and President of the court in 1831, when it was his son, Henry St. George Tucker who was meant; the father having died in 1826.

St. George Tucker edited Blackstone's Commentaries "with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and the Commonwealth of Virginia". 5 Vols. Phila. 1803.

Henry St. Geo. Tucker—son of the former—published "Commentaries on the Laws of Virginia, comprising the substance of a Course of Lectures delivered to the Winchester Law School" 2 Vols. Winchester, 1836-37.

These books are now rare, and command high prices.